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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

YANKEE ATOMIC ELECTRIC COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF IN SUPPORT OF PETITIONER FILED BY THIRTY-ONE ELECTRIC UTILITIES AS *AMICI CURIAE*

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BRIEF IN SUPPORT OF PETITIONER FILED BY THIRTY-ONE ELECTRIC UTILITIES AS *AMICI CURIAE*[1]

This case concerns the power of the federal government, having entered into written contracts to perform services at a fixed price, to impose substantial additional charges on the purchasers of those services many years after the contracts were fully performed.

For over 30 years, the federal government provided uranium enrichment services to electric utilities for fuel used in nuclear power plants. Those services were furnished under fixed-price contracts with each

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[1] No counsel for any party in this case authored this brief, either in whole or in part. No person or entity other than the *amici* listed in footnote 2 has made a monetary contribution to the preparation or submission of this brief. Consent to file this brief has been obtained from the parties, as reflected in correspondence filed with the Clerk of the Court.

utility. Much later, Congress enacted the Energy Policy Act of 1992 ("EPACT") which, *inter alia*, provided for the eventual privatization of the federal government's uranium enrichment enterprise. In order to avoid saddling the new entity with the costs of decontamination and decommissioning ("D&D") of the enrichment facilities, Congress imposed a special assessment on domestic utilities based on the amount of enrichment services each utility previously acquired from the government. The total assessment imposed on utilities is in excess of $2.25 billion.

In upholding the special assessment, the court of appeals majority fundamentally misapplied the principles of this Court's decision in *United States v. Winstar Corp.*, 116 S. Ct. 2432 (1996). Disregarding *Winstar*, the court of appeals approved a severely retrospective assessment that has the effect of releasing the government from explicit fixed-price terms of contracts under which it sold uranium enrichment services. The contracts on which this assessment is now levied, in fact, date back more than 30 years. The court of appeals decision thus has far-reaching implications. It creates great uncertainty as to whether the federal government is ever bound by the payment terms of its contracts with private parties and will certainly erode the public's confidence in the government as a reliable contracting partner. While the court of appeals majority justified its result by treating the special assessment as a general tax, this conclusion conflicts with the Court's precedent. Even assuming *arguendo* that the assessment is properly characterized as a tax, the extreme retroactivity of the assessment makes it constitutionally infirm. For these reasons, *amici* support the petitioner in seeking review by this Court.

INTERESTS OF *AMICI CURIAE*

The *amici* are 31 electric utility companies[2] that, like the petitioner Yankee Atomic Electric Company ("Yankee Atomic"), have rights under government contracts abrogated by the special assessment imposed under EPACT. All *amici* purchased uranium enrichment services from the federal government under contracts with pricing provisions identical or similar to those in the Yankee Atomic contracts.

Most of the *amici*, as well as other utilities, have filed claims in the Court of Federal Claims seeking relief from the assessment on the grounds that it represents a breach of contract and a taking of vested property rights.[3] All the cases below have been

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[2] The *amici* consist of the following companies: Arizona Public Service Company; The Cincinnati Gas & Electric Company; Commonwealth Edison Company; The Detroit Edison Company; Duke Energy Corporation; Duquesne Light Company; Entergy Operations, Inc.; Florida Power Corporation; Florida Power & Light Company; GPU Nuclear, Inc.; IES Utilities, Inc.; Indiana Michigan Power Company; Kansas City Power & Light Company; Kansas Electric Power Cooperative, Inc.; Kansas Gas and Electric Company; Nebraska Public Power District; New York Power Authority; Niagara Mohawk Power Corporation; Omaha Public Power District; PECO Energy Company; PSI Energy, Inc.; Public Service Electric & Gas Company; Rochester Gas & Electric Corporation; Southern California Edison Company; Southern Nuclear Operating Company; Texas Utilities Electric Company; Union Electric Company; Virginia Electric & Power Company; Washington Public Power Supply System; Wisconsin Public Service Corporation and Wolf Creek Nuclear Operating Corporation.

[3] Docket Nos. 96-290C, 96-616C, 96-217C, 96-218C, 96-712C, 96-702C, 96-673C, 97-269C, 96-430C, 97-18C, 96-490C, 96-748C, 96-674C, 96-780C, 97-236C, 96-429C, 96-371C, 96-654C, 96-407C, 97-108C, 97-268C and 97-686C.

stayed pending the outcome of this case. Accordingly, *amici* have a substantial interest in this matter.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' DECISION HAS A MAJOR ECONOMIC IMPACT ON AFFECTED UTILITIES AND CREATES GREAT UNCERTAINTY FOR WHETHER THE FEDERAL GOVERNMENT IS BOUND BY ITS CONTRACTS

The importance of this case is evident not only in the huge sums to be collected under the special assessment and the economic impact of that liability, but also in the violence done to basic contract and constitutional principles.

1. The special assessment imposed under EPACT requires domestic utilities that acquired uranium enrichment services from the government to pay up to $150 million per year for 15 years, or until a total of not less than $2.25 billion has been collected. 42 U.S.C. § 2297g-1. This typically amounts to $1 million to $1.5 million each year for a single commercial nuclear power unit. For most utilities, the effect is to increase their *total* cost of all past uranium enrichment purchases from the federal government by 10 to 20 percent.

In response to this enormous new liability, virtually the entire nuclear power industry has sought relief in the Court of Federal Claims. *Amici* comprise the vast majority of nuclear utilities in this country, which, together with the petitioner as well as other affected utilities, are seeking relief from the D&D provisions of EPACT. Some 30 separate actions have been filed by *amici* and others, seeking refunds of past payments totaling over $400 million. The suits in the Court of Federal Claims are currently stayed pending the resolution of this case, which will establish the binding law of the Federal Circuit. A conflict

among the United States courts of appeals is not likely since these actions all arise in that Circuit. Granting certiorari is therefore timely and will enable the Court to settle the important questions of law governing the large number of cases pending below.

Not only are vast sums of money directly at stake, the special assessment could also undermine the competitive advantage of many nuclear generating facilities. Many states are moving toward deregulation of the electric utility industry. In a competitive market, a utility's ability to compete may be threatened—quite unfairly—by the government's retroactive increase in contract price. Where utilities still operate under traditional cost-of-service ratemaking, they may be able to recover the cost of the special assessment in rates, but that result is by no means assured. At least one state public service commission has already disallowed the pass-through of this liability.[4]

2. The court of appeals' decision undermines the sanctity of contracts with the federal government. Utilities purchased uranium enrichment services under standard fixed-price contracts offered by the government. Those contracts provided that the charges for a separative work unit ("SWU"), the standard measure of enrichment services, were based upon the published price "in effect at the time of performance" —defined as the date of delivery of the related enriched uranium to the customer. The contracts also provided that any increase in price required advance notice to the customer. None of the contracts provided any right to revise the prices for enrichment *after* receipt of the services.

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[4] *Wisconsin Public Service Corp.*, Docket No. 6690-UR-110. Findings of Fact, Conclusions of Law and Order, dated Feb. 25, 1997.

Thus the contracts embodied an explicit obligation by the government to supply services at a specified fixed price. By virtue of the performance of the contracts, utilities acquired vested property rights protected by the Fifth Amendment, and the federal government may not unilaterally alter or destroy the essential terms of those contracts. *Perry v. United States*, 294 U.S. 330, 353-54 (1935); *Lynch v. United States*, 292 U.S. 571, 579 (1934). As this Court ruled in *Perry*, the government is not free to repudiate the payment terms of its contracts. 294 U.S. at 350. Yet that is precisely the effect of the special assessment at issue here. The assessment exacts more funds for services already rendered and paid for. It thereby nullifies the fixed-price terms of the contracts. Where, as here, a statute has "the substantial effect of releasing the Government from its own contractual obligations," *Winstar*, 116 S. Ct. at 2468, the government remains liable for damages in its role as contractor.

The court of appeals' decision to the contrary has far-reaching implications. First of all, it renders the pricing provisions of the government's contracts wholly illusory, and essentially means that the government is never bound by a promise to sell goods or services at a set price. This result is a radical departure from this Court's decisions in *Perry* and *Winstar*. Moreover, the decision below, if allowed to stand, would establish a precedent for similar exactions in other contexts when the federal government decides it has paid too much or charged too little for goods or services bought or sold at arm's length. In addition to the manifest unfairness to the targeted companies, this case thus has serious implications for whether the federal government can be counted on by anyone as a reliable contracting part-

ner. The Court should therefore grant certiorari to resolve the serious issues raised.

II. THE COURT OF APPEALS' DECISION CONFLICTS WITH THIS COURT'S DECISION IN *WINSTAR* IN VIEW OF THE COMMERCIAL NATURE OF THE GOVERNMENTAL ACTION

The court of appeals majority based its decision on the sovereign acts and unmistakability doctrines. This was clearly in error. Under this Court's precedent in *Winstar*, the nature of the government's action, in releasing itself from its own contractual obligations for commercial reasons, precludes a finding that it is a "public and general" sovereign act.

1. In providing uranium enrichment services, the government at all times acted as a commercial business enterprise, supplying services pursuant to the terms of written contracts. In the formation of those contracts, the government had ample authority and opportunity to recover its full costs in the pricing of SWU. From the early days of the enrichment program, the federal government adhered to a "fundamental concept" in pricing SWU—namely, full recovery of the government's costs over a reasonable period of time.[5] Section 161v of the Atomic Energy Act was amended in 1970 to specify that the price "shall be on a basis of recovery of the Government's costs over a reasonable period of time. . . ." [6] Indeed, as discussed below, the federal government had a near monopoly on the world uranium enrichment market until the mid-1970s, and therefore had the discretion to set its prices in a manner to ensure full cost recovery. Thus, there can be no question that the Atomic Energy Commission and its successors, the Energy Research and Development Administration

[5] *See, e.g.*, H.R. Rep. No. 91-1470, 91st Cong. (1970), *reprinted in* 1970 U.S.C.C.A.N. 4981, 5002.

[6] 42 US.C. § 2201v (1970).

and the Department of Energy,[7] had the authority and opportunity (indeed, were *required* by the Atomic Energy Act) to price enrichment services so as to recover all the government's costs, including costs which obviously would need to be borne eventually for the decontamination and decommissioning of the facilities.

2. The court of appeals majority characterized the "main purpose" of the special assessment as being "to spread the costs of a problem that [Congress] *realized only after the contracts had been performed.*" [8] Contrary to this pivotal assumption, the ultimate need to decontaminate and decommission the enrichment facilities was foreseen or reasonably foreseeable decades ago, and the government was in fact recovering estimated D&D costs in the SWU price before passage of EPACT in 1992.

The federal government was aware early on that there would be substantial D&D costs associated with nuclear facilities. Many nuclear facilities, including several operated by the federal government, had already been decommissioned between 1950 and 1970.[9]

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[7] The federal government's uranium enrichment enterprise was originally run by the Atomic Energy Commission ("AEC"). This function was transferred to the Energy Research and Development Administration ("ERDA") in 1974. In 1977, the Department of Energy ("DOE") assumed responsibility for the program. DOE maintained responsibility for the uranium enrichment enterprise until it was transferred to the newly created United States Enrichment Corporation under EPACT.

[8] *Yankee Atomic Electric Co. v. United States*, 112 F.3d 1569, 1575-76 (Fed. Cir. 1997) (emphasis added).

[9] *See* NUREG-0586. "Final Generic Environmental Impact Statement on Decommissioning of Nuclear Facilities," published by the Nuclear Regulatory Comm'n (Aug. 1988), at

By 1970, the AEC—the very agency then responsible for the enrichment program—was focusing on the need to assure recovery of D&D costs for fuel reprocessing plants.[10] In 1977, the Comptroller General of the United States issued a report to the AEC's successors, ERDA and the Nuclear Regulatory Commission, highlighting the need to plan for the substantial D&D costs for nuclear facilities, including those operated by the federal government.[11]

In full knowledge that all nuclear facilities need to be decontaminated and decommissioned in due course, the federal government was required to and had ample statutory authority to incorporate D&D costs into the pricing of enrichment services. From the beginning, the federal government's pricing policies purported to cover "all" the government's cost, and therefore must be presumed to have included an allowance for D&D costs. For example, the AEC's 1973 pricing criteria stated that the charges covered, among other things, "electric power and *all other costs, direct and indirect, of operating the enrichment plants* . . . ." [12] Significantly, the price included a "margin for contingencies" which would have covered D&D and any other costs that could not be determined precisely.[13]

Tables 1.5-1 and 1.5-2 (citing 10 nuclear facilities decommissioned before 1970).

[10] *See Siting of Fuel Reprocessing Plants and Related Waste Management Facilities*, 35 Fed. Reg. 17,530 17,532 (1970).

[11] *Cleaning Up the Remains of Nuclear Facilities—A Multi-Billion Dollar Problem*, EMD-77-46, dated June 16, 1977.

[12] *Uranium Enrichment Services Criteria*, published by Atomic Energy Comm'n, dated Jan. 23, 1973, at 7.

[13] *See* H.R. Rep. No. 91-1470, *supra* note 5, at 5003 (quoting General Accounting Office review of AEC pricing criteria). DOE's revised pricing criteria published in 1986 similarly

In fact, in its fiscal year 1988 pricing, the government included an explicit allowance for projected D&D costs. As DOE informed Congress in 1990:

> DOE has recognized and recovered environmental costs and D&D in FY 1988, FY 1989, and FY 1990 through its enrichment prices and DOE will recover all future environmental and D&D costs through future enrichment prices.[14]

DOE further stated that "[b]eginning in FY 1991 SWU charges will also recover $50 million each year to cover the commercial [utility] share of future D&D activities for all three [uranium enrichment] sites." [15] Thus the court of appeals decision was based on the erroneous assumption that D&D costs were an after-discovered cost.

3. The government's pricing of uranium enrichment services was not impaired by the unforeseeability of the need to decontaminate and decommission. This ultimate need was obvious from the beginning. Further, later on, the government's pricing was driven quite clearly by the commercial desire to induce utilities to continue to purchase government-produced uranium enrichment. In marketing its uranium enrichment services, the government recognized that price was the "predominant factor that customers use in determining their source of enrich-

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represented that the SWU price was established based on "all" the government's costs of operating the facilities. Final Rule, *Uranium Enrichment Services Criteria*, 51 Fed. Reg. 27132 (1986) (codified at 10 C.F.R. § 762.5 (1986)).

[14] *Dep't of Energy's Uranium Enrichment Program: Hearing before the Subcomm. on Energy Research and Development of the Senate Comm. on Energy and Natural Resources*, 101st Cong. 133 (May 1, 1990).

[15] *Id.* at 139.

ment supply." [16] While the federal government had a near monopoly on the world uranium enrichment market in the early years of the program, by the mid-1970s, foreign competition emerged for supplying enrichment services. With competition, customers had the option to seek enrichment services from suppliers other than the federal government. Some utilities began to cancel commitments to DOE (in accordance with contract termination provisions) in order to purchase SWU from lower-cost sources.[17] As a result, the federal government's share of the uranium enrichment market declined to below 50 percent by the early 1980s.[18]

In an effort to preserve market share, the government offered incentives to induce utilities to remain long-term customers. In January 1984, DOE introduced a new form of uranium enrichment contract, the "Utility Services Contract"—which included lower prices and more flexible terms than earlier contracts.[19] The Utility Services Contract stated that

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[16] *Id.* at 135.

[17] H.R. Rep. No. 102-474, Part 2, 102d Cong. (1992), *reprinted in* 1992 U.S.C.C.A.N. 2064.

[18] For background, *see* Final Rule, *Uranium Enrichment Services Criteria, supra* note 13.

[19] The Utility Services Contract is not involved in the present case, but will be in many of the pending cases in the Court of Federal Claims brought by other utilities. Approximately 90 percent of DOE's customers converted to these contracts. The contract term was 30 years, with an established 10-year ceiling price, adjusted annually for inflation. Customers were allowed to purchase up to 30 percent of their annual SWU requirements from non-DOE sources. In exchange for utilities converting to this form of contract, DOE entered into Supplemental Agreements of Settlement which acknowledged that the utilities had fulfilled their obligations under the prior contracts.

> DOE intends to serve as a reliable long term supplier of uranium enrichment services at predictable prices while providing the most competitive prices possible through technological innovation; and . . . DOE desires to operate the enrichment complex on a sound business basis without Government subsidy . . . .

Once it had established a customer base with the new contracts, the government began marketing initiatives to expand sales. In 1985 and 1986, DOE offered "incentive prices" substantially below the standard SWU price in order to attract additional purchases from customers.[20] The pricing terms of the contracts were thus a clear inducement to utilities to purchase services from the government.

4. In 1992, as part of EPACT, Congress comprehensively restructured the government's uranium enrichment business, created the United States Enrichment Corporation ("USEC") and provided for the eventual privatization of the enrichment program in USEC. 42 U.S.C. § 2297d. The new government corporation (as lessee of the enrichment plants) was relieved of any preexisting D&D liability (prior to July 1, 1993). EPACT specified that D&D costs "shall remain the sole responsibility of [DOE]," 42 U.S.C. § 2297c-2, but imposed the special assessment on domestic utilities to fund DOE's obligation.

The legislative history reveals that Congress was concerned that the government's restructured uranium enrichment business would not be able to operate competitively and profitably if it retained responsibility for D&D costs:

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[20] *See Uranium Enrichment: Congressional Action Needed to Revitalize the Program*, General Accounting Office, dated Oct. 1987, at 42.

> A Government corporation, with a clearly defined mission to operate as a commercial enterprise on a profitable and efficient basis, will provide the enrichment program with the businesslike structure and flexibility that is crucial to the survival of the program. In addition, *any legislation for revitalizing the enrichment enterprise should also address other issues which affect the program, such as the decontamination and decommissioning of the enrichment plants.*[21]

Congress was obviously concerned about the new corporation's ability to maintain competitive prices and attract private investors. Thus the special assessment shifted the D&D obligation from the government, where it belonged, to the government's contract partners in order to enhance the value of the new entity to the government and enable USEC to be competitive in the open market. The effect of this action was to repudiate, for commercial reasons, the fixed price terms of the contracts and deprive utilities of their vested contract rights. Under the principles of *Winstar*, such a result precludes a finding that the special assessment is a "public and general" sovereign act. 116 S. Ct. at 2469.

III. THE COURT OF APPEALS' CHARACTERIZATION OF THE SPECIAL ASSESSMENT AS A "GENERAL TAX" CONFLICTS WITH PRECEDENT OF THIS COURT

1. The court of appeals stated in the majority decision that the characterization of the special assessment as either a retroactive price increase or an exercise of the sovereign's taxing power was the dispositive issue of the appeal. 112 F.3d at 1573. In characterizing it as a "general tax," 112 F.3d at

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[21] H.R. Rep. No. 102-474, Part 2, *supra* note 17, at 2084 (emphasis added).

1576, the court of appeals ignored long standing precedent of the Supreme Court. A tax is generally "an extraction for the support of a government" or "the enforced proportional contribution of persons and property, levied by the authority of the state for the support of the government and for all public needs." *United States v. Butler*, 297 U.S. 1, 61 (1936) and *Bank of Mount Hope v. Commissioner*, 25 B.T.A. 542, 543 (1932) (citing *Florida Central & Peninsula Railroad Co. v. Reynolds*, 183 U.S. 471, 475 (1902)). Customarily taxes are broadly applied on an involuntary basis to all persons falling within a definite class or area.[22]

In a related context, the Internal Revenue Service has ruled that a tax is an enforced contribution imposed and collected for the purpose of raising revenues to be used for public or governmental purposes and not for some special privilege granted or service rendered.[23] Ordinarily when amounts are paid into a specific fund or earmarked for a specific purpose, they are treated as imposed as a charge for a privilege or service rendered and not as a tax.[24]

The special assessment prominently displays the characteristics which the Supreme Court (and the Internal Revenue Service) repeatedly have held do *not* constitute a tax. First, the fee is imposed on an exceedingly narrow base—those who puchased enrichment services and only to the extent of their pur-

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[22] *Houck v. Little River Drainage District*, 239 U.S. 254, 264-265 (1915).

[23] *See, e.g.*, Rev. Rul. 86-140, 1986-2 C.B. 195; Rev. Rul. 81-193, 1981-2 C.B. 52; Rev. Rul. 79-180, 1979-1 C.B. 95; Rev. Rul. 77-29, 1977-1 C.B. 44; Rev. Rul. 71-49, 1971-1 C.B. 103; Rev. Rul. 61-152, 1961-2 C.B. 42.

[24] Rev. Rul. 77-29, *supra*, and Rev. Rul. 71-49, *supra*.

chases. Second, the fee is paid into a special fund in order to defray part of the cost incurred by the government in providing the services.

2. The majority's characterization of the special assessment as an exercise of the government's taxing power turned on the fact that the assessment was imposed not just on utilities which had contracts with the government but also on those who purchased SWUs from the government's contracting partners. 112 F.3d at 1575. The government concedes that at most 15 percent of SWUs were purchased on this secondary market. The petitioner submits that those secondary market purchasers are utilities that also had direct purchase contracts with the government.

The incidental imposition of the fee on third party purchasers of SWUs does *not* make the assessment a tax. The direct linkage between the users of DOE's enrichment services and the special assessment instead supports the conclusion that it is a supplemental payment for enrichment services. As this Court noted in *Winstar*, Congress may not disguise the targeting of government contractors by also assessing some insignificant number of transactions that were not under direct government contracts. 116 S. Ct. at 2468 ("Legislation can almost always be written in a formally general way, and the want of an identified target is not much security *when a measure's impact nonetheless falls substantially upon the Government's contracting partners*.") (emphasis added).

The overwhelming majority, if not all, of the affected third-party purchasers also had directly contracted with the government for the bulk of their enrichment services. In practice, the government's contracting partners bought and sold SWUs among themselves as their immediate need for enrichment

services varied from their contractual ability to secure enriched uranium from the government. The pool of SWU users did not expand significantly beyond the contracting partners by virtue of these secondary purchases.

The scant legislative history on this aspect of EPACT reveals no Congressional intent to impose a broad-based tax. The provisions in the law subjecting third-party purchasers to the assessment were not part of the original bill and were only included in the legislation when the House Committee bills were consolidated and sent to conference. The House bills that first included the special assessment simply stated that the assessment was to be collected from utilities in proportion to the amount of enrichment services they had purchased.[25] In applying the assessment to third-party purchasers, Congress was apparently attempting to prevent the obvious and additional unfairness of assessing a utility that had purchased certain SWUs from the government but never used them.

The impact of the D&D assessment falls overwhelmingly, if not exclusively, on the government's contracting partners. Therefore, the Federal Circuit's reliance on the inclusion of third-party purchases conflicts with *Winstar* and should be reviewed by the Supreme Court. Further, the court of appeals' characterization of the special assessment as an exercise of the sovereign's taxing power is erroneous under *Butler* and *Florida Central* and should be reviewed by the Supreme Court.

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[25] *See* H.R. Rep. No. 102-474, Part 1, 102nd Cong. (1992), *reprinted in* 1992 U.S.C.C.A.N. 1954; H.R. Rep. No. 102-474, Part 2, *supra* note 17.

IV. THE SPECIAL ASSESSMENT IS CONSTITUTIONALLY IMPERMISSIBLE DUE TO ITS EXTREME RETROACTIVITY

Even if one were to accept *arguendo* the court of appeals' characterization of the special assessment as a tax, serious constitutional questions are raised concerning retroactivity. The assessment is levied on transactions that occurred beginning in the 1950s. Permissible retroactivity of taxes has generally been "confined to short and limited periods required by the practicalities of producing national legislation." *United States v. Darusmont*, 449 U.S. 292, 296 (1981); *United States v. Hudson*, 299 U.S. 498, 500 (1937).

A tax on transactions dating back over 30 years is unprecedented and would go well beyond anything this Court has countenanced. *See, e.g., Nichols v. Coolidge*, 274 U.S. 531 (1927) (striking down 12-year period of retroactivity); *United States v. Carlton*, 512 U.S. 26, 38 (1994) ("[A] period of retroactivity longer than the year preceding the legislative session in which the law was enacted would raise . . . serious constitutional questions.") (O'Conner, J., concurring). Review by this Court is therefore warranted to ensure that the constitutional protections against retroactive taxation are not eroded.

In this connection, the Court has recently granted review in a case concerning the constitutionality of legislation that imposes retroactive liability. *Eastern Enterprises v. Chater*, 110 F.3d 150 (1st Cir. 1997), *cert. granted sub nom. Eastern Enterprises v. Appel*, 66 U.S.L.W. 3296 (U.S. Oct. 20, 1997) (No. 97-42). Given the extreme period of retroactivity involved here and the government's readjustment of its own contractual obligations, review is also appropriate in the present case. In the alternative, *amici* support

the petitioner's request that the Court defer ruling on the petition pending its decision in *Eastern Enterprises*.

CONCLUSION

This case has enormous importance because of the precedential effect the decision by the Court of Appeals for the Federal Circuit will have on the utility industry and the government contracts community generally. The court of appeals' decision is inconsistent with the legal principles clearly enunciated by the Supreme Court in *Winstar*. For these reasons, *amici* respectfully request that the Supreme Court grant certiorari.

Respectfully submitted,

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